STATE OF MICHIGAN

COURT OF APPEALS

ENVIRONMENTAL DISPOSAL SYSTEMS INC.,

Plaintiff-Appellee,

v

HAROLD R. FITCH, STEVEN E. CHESTER, and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants,

and

SUNOCO PARTNERS MARKETING & TERMINALS, L.P.,

Defendant-Appellant,

and

POLICEMEN & FIREMEN RETIREMENT SYSTEM BOARD OF TRUSTEES,

Intervening Plaintiff-Amicus Curiae.

UNPUBLISHED
November 1, 2005

No. 256671
Ingham Circuit Court
LC No. 03-000968-AZ

ENVIRONMENTAL DISPOSAL SYSTEMS INC.,

Plaintiff-Appellee,

v

HAROLD R. FITCH, STEVEN E. CHESTER, and DEPARTMENT OF ENVIRONMENTAL QUALITY,

No. 256820
Ingham Circuit Court
LC No. 03-000968-AZ

Defendants-Appellants,

and

SUNOCO PARTNERS MARKETING & TERMINALS, L.P.,

Defendant,

and

POLICEMEN & FIREMEN RETIREMENT SYSTEM BOARD OF TRUSTEES,

Intervening Plaintiff-Amicus Curiae.

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In these consolidated appeals, defendants Michigan Department of Environmental Quality (MDEQ) and Sunoco Partners Marketing & Terminals, L.P. (Sunoco) appeal by leave granted the June 23, 2004, circuit court order reversing the MDEQ's decision to issue a Part 625 permit to Sunoco, and declaring that permit null and void. We affirm.

On appeal, defendants argue that the circuit court failed to apply the correct standard of review with regard to the MDEQ's decision to grant Sunoco a permit. After reviewing this question of law de novo, we agree. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).

The MDEQ was created as a principal department within the Executive Branch by MCL 324.99903 and was given authority under Part 625 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.62501 *et seq*., over mineral wells. Pursuant to that authority, the MDEQ issued both Environmental Disposal Systems, Inc. (EDS) and Sunoco permits to drill into the Mt. Simon Formation. EDS was permitted to drill a well for the purpose of hazardous waste disposal and Sunoco was permitted to drill a well for the purpose of extracting brine. EDS appealed the decision to issue Sunoco a permit to the circuit court, arguing that the issuance of Sunoco's permit effectively revoked EDS's permit because the permitted uses were incompatible. It is uncontested that EDS had standing to bring the legal action. However, EDS claims, and the circuit court agreed, that the standard of review with respect to the MDEQ's decision was provided by MCL 324.62504. The MDEQ and Sunoco argue that the standard of review was provided by the Constitution. After reviewing this question of statutory interpretation de novo, we conclude that the MDEQ and Sunoco are correct. See *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001).

MCL 324.62504 provides:

> The commission shall act as an appeal board regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit under this part. If an owner or operator considers an order made by the supervisor of mineral wells to be unduly burdensome, inequitable, or unwarranted, the owner or operator may appeal to the commission or the court for relief as provided in this act, and shall give notice to the supervisor of mineral wells.

As an issue of statutory interpretation, our goal is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The specific language of the statute is the initial consideration when determining that intent. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the plain and ordinary meaning of the language is clear, judicial construction is not permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Here, by the plain language of that statute, EDS, as an owner or operator of a mineral well, had the option of appealing an order that it considered unduly burdensome, inequitable, or unwarranted to the commission of natural resources, MCL 324.301(a), or to the court "for relief as provided in this act." The phrase "for relief as provided in this act," refers to MCL 324.1101, which states:

> (1) If a person has legal standing to challenge a final decision of the department under this act regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit or operating license, the commission, upon request of that person, shall review the decision and make the final agency decision. A preliminary, procedural, or intermediate decision of the department is reviewable by the commission only if the commission elects to grant a review. If a person is granted review by the commission under this section, the person is considered to have exhausted his or her administrative remedies with regard to that matter. The commission may utilize administrative law judges or hearing officers to conduct the review of decisions as contested case hearings and to issue proposals for decisions as provided by law or rule.
>
> (2) In all instances, except those described in subsection (1), if a person has legal standing to challenge a final decision of the department under this act, that person may seek direct review by the courts as provided by law. Direct review by the courts is available to that person as an alternative to any administrative remedy that is provided in this act.

EDS chose the second option, "direct review by the courts as provided by law." MCL 324.1101(2). There are generally three statutory mechanisms for such review: (1) the review process prescribed in a statute applicable to the agency, (2) an appeal to the circuit court under the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules, 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq*. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 519; 684

NW2d 847 (2004). In its second amended complaint, EDS averred that the appeal was brought under MCL 600.631 of the RJA. Because there is no review process set forth in an applicable statute and it was not a "contested case" within the contemplation of the APA, review must proceed under MCL 600.631. See *J & P Market, Inc v Liquor Control Commn*, 199 Mich App 646, 650-651; 502 NW2d 374 (1993); *13 Southfield Assoc v Michigan Dep't of Public Health*, 82 Mich App 678, 685; 267 NW2d 483 (1978).

MCL 600.631 states:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

MCL 600.631 provides the statutory grant of jurisdiction and the method by which to bring an appeal; it does not provide the scope of judicial review. In *Viculin v Dep't of Civil Service*, 386 Mich 375, 392, 397; 192 NW2d 449 (1971), our Supreme Court held that the scope of judicial review for an appeal proceeding under MCL 600.631 is provided by article 6, § 28 of the Michigan Constitution, which provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In this case, it is undisputed that a hearing was not required, therefore, the scope of judicial review dictated by the Constitution is, at minimum, whether the decision to issue Sunoco a permit was authorized by law. EDS argues that the minimum scope of review provided by the Constitution was just that, a minimum, and that MCL 324.62504 provided for a more rigorous standard of review. EDS cites as its sole authority for the proposition that MCL 324.62504 sets forth the standard of review the case of *Buchanan v City Council of Flint*, 231 Mich App 536; 586 NW2d 573 (1998), but this case is wholly inapposite. In *Buchanan*, the defendant City Council removed the plaintiff ombudsman from office after conducting a formal hearing. The plaintiff appealed and the matter was considered under a de novo standard of review because a provision in the city charter specifically provided that removal of an elected or appointed city employee had to be for cause and that such decision was "subject to judicial review in a hearing de novo." *Id*. at 543-544.

The statute at issue in this case, MCL 324.62504, does not contain such a specific directive. It states that "[i]f an owner or operator considers an order made by the supervisor of mineral wells to be unduly burdensome, inequitable, or unwarranted, the owner or operator may

appeal . . . ." By its plain language the statute merely provides for an appeal if, in the subjective opinion of the owner or operator, an order was unduly burdensome, inequitable, or unwarranted. The statute's focus is the opinion of the owner or operator and does not direct the court to utilize that standard to guide its objective opinion. While it is true that the Legislature could have adopted a more rigorous standard of review than that provided by the Constitution, it failed to do so with respect to Part 625 of the NREPA.

EDS argued, and the circuit court agreed, that article 6, § 28 of the Constitution conferred standing on EDS to pursue a judicial remedy therefore the Legislature must have intended the "unduly burdensome, inequitable, or unwarranted" phrase to be the standard of review. We disagree. First, assuming arguendo that the Constitution did confer standing, it does not follow that MCL 324.62504 sets forth the standard of review. The terms used in MCL 324.62504, "unduly burdensome, inequitable, or unwarranted" can only reasonably be interpreted as describing the type of adverse affect, i.e., injury, allegedly impacting the legally protected interest that arises from being an owner or operator of a mineral well by virtue of a previously issued permit. The phrase describes the grounds for taking an appeal. EDS has considered the phrase "unduly burdensome, inequitable, or unwarranted" out of its grammatical context. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

Second, if the Legislature had intended to set forth a standard of review with regard to mineral well permit decisions, it would have made that intent clear just as it did when it conferred a de novo standard of review with regard to Part 17 of the NREPA, the Michigan Environmental Protection Act, MCL 324.1701 *et seq*. See *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641 (1998). In other words, there is no need to attempt to second guess what the Legislature intended, the statute can only reasonably be interpreted in one way, therefore, it is not ambiguous and judicial construction is not permitted. See *Nastal, supra*.

Accordingly, because the scope of review is not provided in an applicable statute, and no hearing was required or conducted at the agency level, the minimum scope of review as provided by article 6, § 28 of the Constitution was applicable, i.e., whether the decision to issue Sunoco the disputed permit was authorized by law. See *J & P Market, Inc, supra* at 650-651. Thus, the circuit court applied the wrong standard of review when it decided this case under MCL 324.62504, stating that it was considering the MDEQ's decision to issue Sunoco a permit as "if the basis for the MDEQ's action will be unduly burdensome, inequitable, or unwarranted, then that action must be reversed." However, as will be discussed below, the circuit court reached the right result albeit for the wrong reason.

Next, defendants argue that the circuit court based its decision on improper considerations when it reversed the MDEQ's decision to grant Sunoco a permit and, thus, the reversal was erroneous. We review a lower court's decision on an administrative appeal to "determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. See *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In other words, the lower court's conclusions of law are reviewed de novo and its findings of facts are reviewed for clear error. *Id*. We agree with defendants that the circuit court failed to apply correct legal principles in reaching its decision, but we disagree that reversal was erroneous.

As discussed above, the MDEQ's decision to grant Sunoco a permit should have been reviewed for determination whether the action was authorized by law. In *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488-489; 586 NW2d 563 (1998), this Court construed the "authorized by law" standard of review as follows:

> There is apparently much confusion regarding the meaning of this constitutional standard, whether an agency's decision is authorized by law. See LeDuc, [Michigan Administrative Law], § 9:05, pp 9-10. We agree that, in plain English, authorized by law means allowed, permitted, or empowered by law. Black's Law Dictionary (5th ed). Therefore, it seems clear that an agency's decision that "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious," is a decision that is *not* authorized by law. *Brandon* [*School Dist v Michigan Ed Services Ass'n*, 191 Mich App 257; 477 NW2d 138 (1991)], *supra* at 263. . . . [W]e find that is also a reasonable articulation of the constitutional standard because it focuses on the agency's power and authority to act rather than on the objective correctness of its decision. [*Northwestern Nat Cas Co*, *supra*.]

In reaching its holding to reverse the MDEQ's decision to issue Sunoco a permit, the circuit court primarily relied on the previous denial decisions of the Supervisor of Mineral Wells and then-Director of the MDEQ which were based on statutory violations arising from the incompatible uses of the Mt. Simon Formation by EDS and Sunoco. The court held that these original decisions were correct because the uses were incompatible and Sunoco's permit effectively revoked EDS's prior-issued permit. However, the circuit court was prohibited from considering the previous denial decisions of the MDEQ, was prohibited from determining the correctness of either the denials or the grant of permit to Sunoco, was prohibited from performing a de novo review of evidence in support of the denials, and was prohibited from rendering findings of fact.

The standard of review is derived from article 6, § 28 of the Michigan Constitution which provides for, "as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Here, no hearing was held by MDEQ with regard to either EDS's challenge to the issuance of the permit (because EDS did not seek an administrative appeal under MCL 324.1101), or with regard to the granting of the permit to Sunoco (because apparently the permit was granted after Sunoco filed a new and amended application following the denials). Therefore, no record containing evidentiary support of MDEQ's decision to **grant** Sunoco a permit existed in which to apply the substantial evidence test. See *Brandon School Dist v Michigan Ed Special Services Assn*, 191 Mich App 257, 263; 477 NW2d 138 (1991); see, also, *Northwestern Nat Cas Co*, *supra* at 488. Accordingly, to the extent the circuit court applied the substantial evidence test in arriving at its conclusions, the analysis was erroneous.

A similar evidentiary situation was presented in the case of *13 Southfield Assoc v Michigan Dep't of Public Health*, 82 Mich App 678; 267 NW2d 483 (1978). There, a prospective nursing home operator appealed the Department of Public Health's certification that no need existed for the nursing home the plaintiff planned to construct. *Id*. at 680-681. Because

a hearing was not conducted, this Court held that (1) appellate review was limited to determining whether the "no need" determination was authorized by law, and (2) evidentiary support for such determination could not be reviewed as a "record." *Id*. at 686. In the absence of a record, the panel concluded, review of an agency's factual determinations was impossible. *Id*. at 686-687.

Here, the evidentiary record that was submitted by the MDEQ, i.e., the "administrative record," primarily consists of documents relating to the MDEQ's initial denials of Sunoco's application for a permit which resulted in Sunoco pursuing an administrative appeal that included a contested hearing. But, the denials are not the issue in the present case—it is the granting of the permit that is the issue. If Sunoco would have proceeded in the circuit court for judicial review of the denials of its application, that reviewing court would have been able to consider the administrative record that was accumulated in the process of Sunoco's administrative appeal, including the MDEQ's denial opinions and the contested hearing record.

Here, however, the MDEQ opinions, contested hearing record, and other documents related to Sunoco's previous application for, and denial of, a permit are irrelevant with regard to EDS's challenge to the grant of the permit to Sunoco. That Sunoco was previously denied a permit is irrelevant because Sunoco submitted an amended permit application, apparently relying on a change in conditions or circumstances. If those previous denial decisions were considered dispositive, such holding would be tantamount to prohibiting a party from ever being granted a permit if such permit was denied at some previous time, despite a change in conditions or circumstances. In other words, it would forever foreclose the possibility of being granted a permit once an application was denied. Therefore, because no hearing was held by MDEQ with regard to the issuance of Sunoco's permit, but for the permit application and the permit itself, no relevant evidentiary record related to MDEQ's decision to grant Sunoco a permit exists. Thus, the "administrative record" that was submitted to the circuit court should not have, in large part, been considered by the circuit court. The circuit court's notice and concern that, in actuality, no administrative record is made when an agency makes a decision is accurate but, although noting that fact, the circuit court still attempted to rely on a "record." In the absence of a hearing, no evidentiary "record" exists. Accordingly, we also agree with defendants' argument on appeal that the circuit court improperly relied on irrelevant documents submitted by EDS.

The only issue properly before the circuit court was whether the MDEQ was authorized by law to issue the permit. Whether the MDEQ's decision was objectively correct may not, and in fact cannot, be determined in the absence of an evidentiary record. And, because the MDEQ is part of the executive branch of government, the judiciary may not encroach on its separate powers unless authorized expressly by the constitution. See Const 1963, art 3, § 2. Therefore, part of the circuit court's holding that—"a review of the record that was submitted clearly shows that the original determination of the DEQ to deny the permit requested by SPMT was correct. These are incompatible uses of this resource"—was impermissible. Such fact finding resulted from a de novo review of the irrelevant "administrative record" and impermissibly focused on the correctness of the decision, rather than on whether the action was authorized by law.

The parties also have misconstrued the nature of judicial review invoked by EDS. They have each set forth extensive arguments in support of their respective positions. These arguments all necessarily require that this Court decide issues of material fact, i.e., particularly, whether Sunoco's operations would cause subsurface or hazardous waste and whether EDS's and Sunoco's proposed uses are compatible. But, those matters are outside the scope of judicial

review. See Const 1963, art 3, § 2. These considerations would require a de novo review of the evidence produced during a hearing and, ultimately, a determination of correctness—an issue not properly before this Court. See *id*; *Northwestern Nat Cas Co*, *supra*.

Whether the MDEQ's decision to issue Sunoco a brine production/extraction permit was authorized by law was the issue properly before the circuit court. As discussed above, an agency's decision that is (1) in violation of a statute, (2) in excess of its statutory authority or jurisdiction, (3) made upon unlawful procedures, or (4) arbitrary and capricious is not authorized by law. *Northwestern Nat Cas Co*, *supra*. The permit itself evidences the decision and, thus, is the subject of review. EDS's primary argument in the circuit court, as well as here, is that the issuance of the permit violates Parts 111 and 625 of the NREPA because it will result in both underground and hazardous waste. See MCL 324.11105, 324.62502.

Part 625, mineral wells, of the NREPA is at issue. Pursuant to MCL 324.62502, "[a] person shall not cause surface or underground waste in the drilling, development, production, operation, or plugging of wells subject to this part." "Underground waste" is defined as "damage or injury to potable water, mineralized water, or other subsurface resources." MCL 324.62501(q). Under MCL 324.62506, the Supervisor of Mineral Wells is charged with the duty to prevent waste and is authorized to promulgate rules to accomplish that duty. Administrative Code Rule 299.2229(2) mandates that the supervisor deny a "permit for a mineral well if he has reason to believe that the locating, drilling, constructing, reworking, or operating of the well cannot be accomplished in a manner designed to prevent surface or underground waste."

Part 111, hazardous waste management, of the NREPA is also at issue in this case. Pursuant to MCL 324.11105, "[a] person shall not generate, dispose, store, treat, or transport hazardous waste in this state without complying with the requirements of this part." MCL 324.11118(1) provides that "a person shall not establish a treatment, storage, or disposal facility without a construction permit from the department." And, MCL 324.11123(1) provides that "a person shall not conduct, manage, maintain, or operate a treatment, storage, or disposal facility within this state without an operating license from the department."

Review of the permit itself reveals that Sunoco may drill its brine production/extraction well into an area consistent with the location of the Mt. Simon Formation. Specifically, provision three provides:

> If this well is completed in one or more Cambrian Geologic horizons below 3900 feet and Environmental Disposal Systems (EDS) begins hazardous waste disposal at its so-called Citrin Drive facility, permittee shall immediately begin a program of testing the produced brine for specific chemical components present in the EDS wastes or a marker compound approved by the department for injection with the EDS wastes. Testing shall be conducted at a minimum of every 15 days thereafter. Permittee shall in addition manage all produced brine as a hazardous waste as that term is understood in Part 111, Hazardous Waste Management, of NREPA until results of the required testing demonstrate to the department's satisfaction that it is not hazardous waste.

We conclude that the issuance of the permit violated Part 111 of the NREPA, including MCL 324.11105, 324.11118, 324.11123, constituting statutory violations.

It is apparent from the language incorporated in provision three of the permit that the MDEQ had reason to believe that hazardous waste would be produced, generated, managed, maintained, treated, or stored as a consequence of the operation of Sunoco's brine well. In accord with that belief, the MDEQ directed Sunoco to "manage all produced brine as a hazardous waste as that term is understood in Part 111 . . . ." But, MCL 324.11105 provides that "a person shall not generate, dispose, store, treat, or transport hazardous waste in this state without complying with the requirements of this part." The word "shall" in a statute is used to designate a mandatory provision. See *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 537; 669 NW2d 594 (2003). And, the statute's language is clear and unambiguous. Because the MDEQ considered the brine that would be produced or generated by Sunoco's well as hazardous waste and Sunoco did not comply with the requirements of Part 111, the MDEQ was not authorized by law to issue the permit. Although it is arguable that the MDEQ can institute conditions on a permit issued pursuant to Part 625 as precautionary measures, the explicit language of the permit indicates that the MDEQ reasonably believed that hazardous waste was expected. The prescribed testing regimen imposed by the permit does not prevent the hazardous waste production. Therefore, the circuit court's conclusion, that the MDEQ's issuance of the permit to Sunoco should be reversed, is correct. Because this matter involved a question of law, we affirm the order to revoke the Part 625 permit issued by the MDEQ to Sunoco, as well as the declaration that the permit is null and void. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens